Supreme Court, U.S.
FILED
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90-1548

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Term: October 10, 1990

SILVIA KAISER a/k/a SILVIA KAISER BLOCK,
Individually, Petitioner

v.

BERNHARD MARTIN PEER, Individually, and
BEVERLY SUE SANDERS, Individually, and
BERINTEX COMPANY, LTD.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

Paul R. Jordan
Georgia Bar No. 404950

Paran Place
2060 Mount Paran Road, N.W.
Atlanta, GA. 30327

(404) 261-6800

QUESTIONS PRESENTED

Is the constitutional protection of the Fifth Amendment to the Constitution of the United States against self incrimination afforded to a citizen of a foreign country in a civil lawsuit?

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QUESTIONS PRESENTED

Is the constitutional protection of the Fifth Amendment to the Constitution of the United States against self incrimination afforded to a citizen of a foreign country in a civil lawsuit?

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

Plaintiffs:

Bernhard Martin Peer, Individually
Beverly Sue Sanders, Individually
Berintex Company, Ltd.

Defendants:

Silvia Kaiser,
a/k/a Silvia Kaiser Block,
Individually
A. J. Block, Trustee
Alphagas Corporation, N.V.
The Beta Company
Bethagas Corporation, N.V.
Blessen Corporation, N.V.
Claus Corporation, N.V.
Consulare Corporation, N.V.,
f/k/a Margaritian Corporation, N.V.
Consulare Corporation, N.V. (Inc.)
Dara Realty, N.V.
Eurodiamant Establishment
Eurodiamant, inc.
Firex Anstalt
Hemlock Corporation, N.V.
Holfina Trust
Holfina Inc.
Immedica, A.G.
Kaiser Trust Company
Kental, N.V.
Lens Corporation, N.V.
Medoff Corporation N.V.,
f/k/a Fomel Corporation, N.V.
Nelando Corporation, N.V.
Niki Gas Company, N.V.
Northwest Place, Ltd.,
f/k/a Urban Medical, Ltd.
Omnivest, N.V.
Prime Anstalt

Prime Establishment
Regalo Corporation, N.V.
Siljen Corporation, N.V., a/k/a Siljen
Corporation, N.V. I and
a/k/a Siljen Corporation, N.V. II
Silvia Kaiser Trust Management
Skypie Corporation, N.V.,
a/k/a Skypie Corporation, N.V.
Skypie Corporation,
a/k/a Skypei Corporation
Tarazona Corporation, N.V.
Togasco, A.G.
Tokagas, A.G.
Tuska Trust
Wika Energy, N.V.
Adolph Jules Block, Jr., a/k/a
A.J. Block, Jr., Individually
Gilbert H. Boyd, Individually
The Law Firm of Fine and Block

OPINIONS BELOW

The Order of the Superior Court of Fulton County granting Plaintiffs' Motion to Compel Discovery is printed in Appendix A, beginning with page A-1. The Supreme Court of Georgia denied Petitioner's Application for Appeal on December 26, 1990, which Order is set forth in Appendix A, page A-6.

JURISDICTION

The Supreme Court of Georgia denied Defendant Silvia Kaiser a/k/a Sylvia Kaiser Block's Application for Appeal on December 26, 1990. Appendix A, page A-6. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257(a) (as amended June 27, 1988, Pub. L. 100-352, § 3, 102 Stat. 662).

CONSTITUTIONAL PROVISION INVOLVED

This case is predicated on the Fifth Amendment to the Constitution of the United States which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On August 27, 1990, Plaintiff/Respondents ("Respondents") filed a Complaint against Defendant/Petitioner, Silvia Kaiser, a/k/a Silvia Kaiser Block ("Kaiser"), a citizen and a licensed trustee under the laws of Liechtenstein, naming forty-seven other defendants in said Complaint, and relating to matters which allegedly occurred commencing in 1981-1982. Plaintiff Bernard Martin Peer ("Peer") is a citizen of Austria, and resides in Houston, Texas. Berintex Company, Ltd. ("Berintex") is a corporation organized under the laws of the country of Liechtenstein and is a citizen of said country. The gravamen of

Plaintiff's Complaint is the allegation that Kaiser took funds belonging to Peer and Berintex in Liechtenstein and converted such funds to her own use. Kaiser, as stated above, is a citizen of Liechtenstein, but is now a resident of the United States. She has denied all the material allegations contained in Respondent's Complaint in her Answer filed in the Superior Court of Fulton County.

Prior to the filing of the Complaint in the Superior Court of Fulton County, Peer had filed a criminal investigation against Kaiser in Liechtenstein evidenced by a copy of the first two pages of the Search Warrant a copy of which is in Appendix A, page A-10 (the "Criminal Investigation"). The Criminal Investigation concerns the very same allegations Peer has raised in the civil action filed in the Superior Court of Fulton County. On September 18,

1990, Respondents deposed Kaiser. At the deposition, Respondents asked Kaiser questions relating to the form of ownership of Holfina Trust, a Liechtenstein entity and a named Defendant in the Complaint. After questioning Kaiser as to whether she had an ownership interest in Holfina Trust, which question was answered, Respondent then asked Kaiser:

> "Prior to Alfred Kaintz's departure from Holfina Trust (in 1979), did he have an ownership interest in Holfina Trust?"

In response to said question, Kaiser invoked the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution, on the basis that the answer to such question would subject her, in her capacity as a licensed trustee under the laws of Liechtenstein, to criminal

prosecution in her native country of Liechtenstein. The deposition was then adjourned, whereupon Respondents filed their Motion to Compel in the Superior Court of Fulton County, Georgia. On November 9, 1990, the Honorable Judge Thelma Wyatt Cummings in the Superior Court of Fulton County, entered an Order, a copy of which is found in Appendix A, page A-1, granting Respondent's Motion. On December 26, 1990, the Georgia Supreme Court denied Kaiser's Application for Appeal, Appendix A, page A-6. On February 4, 1991, Judge Cummings granted Kaiser's Motion for Stay of Enforcement of the November 9, 1990 Order, Appendix A, page A-7.

The Superior Court of Fulton County relied upon Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972), in rendering its decision. It is

submitted herewith that the Superior Court of Fulton County has misinterpreted and misapplied Zicarelli, and, moreover, Kaiser is protected by the Fifth Amendment to the United States Constitution from self-incriminatory testimony.

REASONS FOR GRANTING WRIT

Kaiser respectfully requests the Court to grant the Writ as the question of Federal Law presented by this case has not been, but should be, settled by this Court. In rendering its opinion the Superior Court of Fulton County avoided, but should have answered, the constitutional question.

The Superior Court of Fulton County relied upon the reasoning of this Court in Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 92 Sup. Ct. 1670, 32 L.Ed.2d 234 (1972), in avoiding the issue and arriving at the

conclusion that there was no "real and substantial risk of prosecution." It is urged that there is a "real and substantial risk" of prosecution in Liechtenstein if Kaiser, in her capacity as a licensed trustee undeerthe laws of Liechtenstein, answers the question submitted to her in the deposition, and therefore, the Constitutional issue framed above is squarely before the Court.

First, Article 33 of The Laws of Liechtenstein, Appendix A, page A-9, as supported by the Affidavit of Dr. Thomas Wilhelm, a Liechtenstein attorney, Appendix A, page A-13, (both such documents having been part of the pleadings filed with the Superior Court of Fulton County) establishes that the disclosure of a third-party ownership interest in a Liechtenstein entity by a licensed trustee of Liechtenstein is a

crime, punishable by fine and imprisonment. Article 121 of the Laws of Liechtenstein, Appendix A, page A-16, provides that such violation of law shall subject the violator to imprisonment and fine.

Secondly, there is a pending criminal investigation in the Country of Liechtenstein instituted by Peer prior to the filing of this action and relating to the same allegations of fraud and theft as set forth in the Complaint. Therefore, no speculation is necessary as to whether or not Kaiser might be subjected to prosecution if she answers the questions posed at the deposition. Upon Kaiser being compelled to respond to the question, Kaiser will be immediately subjected to prosecution, fine and imprisonment in the Country of Liechtenstein.

Thirdly, the question posed to Kaiser related to whether or not a third party, Alfred Kaintz (neither the Plaintiffs, nor any of the Defendants) has an ownership interest in Holfina Trust in 1979. Kaiser is a licensed trustee under the laws of Liechtenstein. Holfina Trust is a Liechtenstein entity, with no evidence of said entity having conducted business in the United States of America or the State of Georgia. Therefore, the question as to whether Kaintz has an ownership interest in Holfina Trust clearly fits under the strictures of Article 33 of The Laws of Liechtenstein, Appendix A, page A-12, and is in violation thereof.

In conclusion, Kaiser has a real and substantial risk of criminal prosecution if she is compelled to answer the question submitted to her in deposition. Therefore, as opposed to the case in

Zicarelli, the constitutional issue as to whether a foreign citizen may invoke the constitutional protection of the Fifth Amendment to the Constitution of the United States against self-incrimination in a civil case in this country, is clearly presented to the Court.

Such issue is one of first impression, and it is respectfully urged, should be answered by this Court. In Zicarelli, this Court declined to address such issue because it found that the appellant therein did not have a "real and substantial risk" of foreign prosecution. Therefore, this issue has never been addressed by this Court.

This issue was addressed, in part, in Murphy v. Waterfront Commission of New York Harbour, 378 U.S. 52 (1963). In Murphy, the Court decided that: "The constitutional privilege against self-

incrimination protected a state witness against incrimination under federal, as well as state law, and a federal witness against incrimination under state as well as federal law." Id. at 77-78. In arriving at its decision, the Court examined English precedent which held that the privilege against self-incrimination protected a witness in an English court from being compelled to give testimony which could be used to convict him in the courts of another country. Following the same English precedent, it is respectfully submitted that the Court would rule that a foreign citizen should be protected against self-incriminatory testimony which could be used to convict such foreign citizen in the courts of another country.

It is further respectfully urged that this case should be reviewed and a precedent set to avoid the gross

misfeasance of justice which would occur if Kaiser were compelled to incriminate herself in this matter. Peer had already initiated a criminal investigation in Liechtenstein seeking criminal penalties against Kaiser in Liechtenstein. He is now attempting by using the civil process in this country to force Kaiser to give testimony which he could add to the criminal investigation in Liechtenstein. Therefore, it is submitted that the decision of the Superior Court to compel Kaiser to answer an extraneous, irrelevant question concerning an individual not a party to this case is merely a device utilized by Peer and the other Respondents to incriminate Kaiser.

It is furthermore contended that the establishment of a precedent against self-incrimination of foreign nationals is essential to give proper direction to the

lower courts. The only Court of Appeals decision which addresses such Constitutional question, and which does not avoid such issue under Zicarelli, supra, is the Fourth Circuit's opinion in United States v. Persons (under seal), 794 F.2d 920 (4th Cir.), cert. denied, 479 U.S. 924, 107 Sup. Ct. 331, 93 L.Ed.2d 303 (1986). In a grand jury investigation, the United States was seeking to compel testimony which could be self-incriminatory under the laws of the Philippines. The Fourth Circuit concluded that the Fifth Amendment privilege did not apply when the United States was the party seeking such testimony. Such a case is distinguishable from the case now before the Court as this matter is a civil dispute and the party seeking to compel the testimony is one of the parties to the civil dispute, and not the government.

The only district court to consider this issue is that of Yves Farms, Inc. v. Rickett, 659 F. Supp. 932 (M.D. Ga. 1987). In Yves Farms, the District Court was presented with facts similar but less compelling than the facts of this matter and concluded that the Fifth Amendment to the United States Constitution did protect foreign nationals against compelled testimony which would incriminate such individuals under foreign criminal laws.

CONCLUSION

It is respectfully submitted that Petitioner's Petition for writ of certiorari be granted.

Respectfully submitted,

Paul R Jordan

Paul R. Jordan
Georgia Bar No. 404950
Attorney for Petitioner

Paran Place
2050 Mount Paran Road
Atlanta, Georgia 30327
(404) 261-6800

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BERNARD MARTIN PEER, et al.	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	CIVIL ACTION
	:	FILE NUMBER
	:	D-81306
SILVIA KAISER a/k/a	:	
SILVIA KAISER BLOCK, et al.	:	
	:	
Defendants.	:	

ORDER

The above-styled case is before the Court on Plaintiffs' Motion to Compel Discovery. Having heard oral arguments of counsel and upon review of the record including supplemental pleadings, the Court GRANTS Plaintiffs' Motion upon the following bases:

Reading together the sections of the Laws of Liechtenstein applicable to the case sub judice, it appears that Article 33 establishes professional

confidentiality laws from Trustees and that violation of professional secrecy. Defendant relies upon Article 33 when refusing to answer questions during depositions in this civil case.

Pursuant to the wording in the penal code, such reliance is misplaced. The Plaintiffs do not allege that Defendant's response constitutes a "disclosure or exploitation of which secret is likely to injure the legitimate interest of the party who has employed that person's services...." It is conceivable that Defendant would be violating the confidentiality laws only if Defendant were to disclose or exploit professional secrets in a manner so as to injure the Plaintiffs.

Additionally, the State Secrecy Law provides that prosecution would ensue only

upon demand of the person whose interest in the secrecy was impaired. Plaintiffs contend that Defendant's failure to respond to questions during deposition will cause impairment to their interests.

Further, Section 121 provides for disclosure if such is justified with respect to content and form by a public or duly authorized private interest. Plaintiffs present such interests to the Court in the case sub judice.

Defendant asserts the privilege against self incrimination under the Fifth Amendment to the U.S. Constitution and the Constitution of the State of Georgia. The U.S. Supreme Court has not squarely addressed the constitutional question of whether a foreign citizen may invoke the Fifth Amendment privilege to protect herself from foreign prosecution.

Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972). In Zicarelli, the Supreme Count did not reach that issue, because the claimant failed to prove that he had a "real" and "substantial risk" of foreign prosecution. Id.

Pursuant to the foregoing discussion, it appears that Defendant will not be in violation of Liechtensteinian confidentiality and secrecy laws by answering questions regarding Plaintiffs' interests; therefore, Defendant would not be subject to criminal penalty pursuant to Section 121 of the Liechtenstein penal code. As in Zicarelli, it is not necessary to reach the constitutional question.

The Court concludes that Defendant should not be allowed to transact business

under the laws of this country and state, yet cloak herself with the veil of secrecy under the laws of a foreign country.

Accordingly, Plaintiff's Motion to Compel is GRANTED. Plaintiff's request for attorneys fees is GRANTED in the amount of $5,000.00.

This 9th day of November, 1990.

//Thelma Wyatt Cummings
THELMA WYATT CUMMINGS
Judge, Fulton Superior

Case No. S91I0270

SUPREME COURT OF GEORGIA,

ATLANTA, DEC. 26, 1990

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

SILVIA KAISER, a/k/a SILVIA KAISER BLOCK, et al. v. BERNARD MARTIN PEER, et al.

From the SUPERIOR COURT OF FULTON COUNTY.

Upon consideration of this Application for Discretionary Appeal, it is ordered that it is hereby denied.

ALL justices concur.

SUPREME COURT OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

//LYNN M. HOGG, Deputy Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BERNARD MARTIN PEER, et al.	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	CIVIL ACTION
	:	FILE NUMBER
	:	D-81306
SILVIA KAISER a/k/a	:	
SILVIA KAISER BLOCK, et al.	:	
	:	
Defendants.	:	

ORDER ON DEFENDANT KAISER'S APPLICATION FOR STAY AND PLAINTIFFS' MOTION TO COMPEL

The above-styled case having come on for hearing on Defendant Kaiser's Application for Stay, Or, In The Alternative, Protective Order and Plaintiffs' Second Motion to Compel, and after hearing argument,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant Kaiser's Application for Stay, Or, In The Alternative, Protective Order is GRANTED and Defendant Kaiser shall not

be compelled to answer questions as to the identity of individual investors or as to the questions where she has asserted her Fifth Amendment privilege until the Supreme Court of the United States has acted on her Petition for Writ of Certiorari or any appeal granted thereon,

IT IS FURTHER ORDERED AND ADJUDGED that all other discovery in this case shall be stayed for a period of forty days from the date hereof pursuant to Plaintiffs' Motion to Compel.

The foregoing Order entered this 4th day of February, 1991.

//Thelma Wyatt Cummings
THELMA WYATT CUMMINGS
Judge, Fulton Superior Court

Article 33

Fiduciaries, auditors, patent attorneys, banks as well as bank and corporation managers who have been authorized domestically in conformity with Article 30 d, section 3, or 39b, are held to carry out their activities in a conscientious and honest manner and, through their behavior, uphold the value and the honor of the profession. They are held to keep confidential any matters entrusted to them. The legal stipulations set forth regarding witness obligations and the obligation to provide information to Civil Servants remain valid.

5 Vr 385/89

District Court of the (seal)
Liechtenstein Principality

SEARCH WARRANT

In the criminal action against Silvia BLOCK-Kaiser, 9493 Mauren, Franz Josef-Oehry Strasse 221, on suspicion of deception, in accordance with Chapters 146, 147, section 2 StGB, and of breach of trust, in accordance with Chapter 153 StGB, a search for the following documents at the place of business of the company called Holfina Trust reg., 9490 Vaduz, is hereby O r d e r e d.

1. Complete business and bookkeeping files as well as other documents pertaining to accounting matters by the company Holfina Trust reg., Vaduz, to the extent that they deal with business matters with Berintex Company Limited,

Vaduz, and with Certified Engineer Helmut Schiebel.

2. Complete business files and other documents pertaining to accounting matters as well as the registration documents for the following companies: Immedica AG, Vaduz, Firex Anstalt, Vaduz, Tuska Trust reg., Vaduz, Prime Establishment, Vaduz, Berintex Company Limited, Vaduz, Urban Medical Limited, Georgia/USA, Consulare Corporation N.V., Claus Corporation N.V., Medoff Corporation N.V., Regalo Corporation N.V., - Siljen Corporation N.V., ali in the Netherlands Antilles and at Northwest Place Limited, Georgia/USA.

All retrieved documents (papers, business documents and documentation) will be seized and placed in legal custody in accordance with Chapter 96, Section 1, StPO.

AFFIDAVIT

COMES NOW, before the undersigned attesting authority, Dr. Thomas Wilhelm who after being duly sworn deposes and states as follows:

1. I am a licensed attorney in the Country of Liechtenstein.

2. As a licensed attorney in Liechtenstein, I am familiar with Liechtenstein law, including, but not limited to the duties of trustees, financial advisers, economic advisers and legal agents under Liechtenstein law.

3. The statutes that most particularly involves duties of professional trustee secrecy is the statute regarding attorneys, legal agents, trustees, auditors, financial advisers, tax advisers, trustees who are bound to special professional secrecy with regard

to the affaires and information entrusted to them, subject however to statutory provisions obliging them to divulge information or to give evidence.

4. Comprised and included within such aforementioned professional secrecy is in my interpretation of the law amongst others and obligation not to reveal names of individuals who have ownership interests in investments undertaken on such individual's behalf or which such agents have knowledge by virtue of their business relationship with such investors.

5. Violation of duties of professional secrecy may be punished with imprisonment up to 1 year. In addition, a fine up to 360 day rates may be imposed.

6. I am familiar with Silvia Kaiser-Block and know her to be an licensed trustee

under the laws of the Country of Liechtenstein.

7. I am aware that Art. 4 of the statute known as Protection of State Law (Staatsschutzgesetz) has been repealed. §§ 121 and 124 of the Liechtenstein Penal Code now deals with the violation of professional secrecy. The aforesaid professional secrecy rules for trustees are still protected pursuant to Article 33 of the Liechtenstein Statute regarding attorneys, legal agents, auditors, financial advisers and tax advisers and breach of them is punishable in the circumstances as described in §§ 121 and 124 aforesaid.

Vaduz, 19th October, 1990.

// Dr. iur. Thomas Wilhelm

§ 121 Breach of Professional Secrets

1) Whosoever discloses or exploits a secret entrusted or made accessible to him in the capacity.

1. of doctor, dentist, chemist or in the exercise of another profession involving health care (Art. 22 of the Medical Law),
2. as lawyer, legal agent, trustee, auditor or patent agent,
3. as juvenile, marriage or family advisor or as a person engaged in social aid,
4. as a person professionally engaged in the task of administering a hospital or with duties involving sickness, accident or social insurance or life assurance, and whose disclosure or exploitation is conducive to the impairment of a duly authorized interest of the person who has made a

claim on his service or for whom his service has been claimed shall be punished with a term of imprisonment of up to six months or with a fine of up to 360 daily rates.

2) Whosoever commits the act in order to obtain pecuniary benefit for himself or another person or to inflict a disadvantage on another persona shall be punished with a term of imprisonment of up to one year or with a fine of up to 360 daily rates.

3) An expert appointed by a court of another authority for a particular action who discloses or exploits a secret that has been entrusted or made accessible to him solely on the grounds of his expertise and whose disclosure or exploitation is conducive to the impairment of a duly authorized

interest of the person who has made a claim on his service or for whom his service has been claimed, shall be punished in the same way.

4) The assistants of the persons who exercise one of the activities described in para. 1 and 3, even if they are not professionally active, as well as the persons who participate in the activity for training purposes, shall be on a par with those persons who exercise one of the activities described in para. 1 and 3.

5) The perpetrator shall not be punished where the disclosure or exploitation is justified with respect to content and form by a public or duly authorized private interest.

6) The perpetrator shall only be prosecuted upon the demand of the

person whose interest in secrecy was impaired (para. 1 and 3).

CERTIFICATE OF SERVICE

I, Paul R. Jordan, certify that I have served three copies of the foregoing corrected petition by having said copies delivered to the offices of:

George O. Lawson, Esquire
970 Martin Luther King Jr. Dr., N.W.
Suite 202
Atlanta, Georgia 30314

Thomas L. Washburn, III, Esquire
5524 Old National Highway
Atlanta, Georgia 30349

Thomas L. Todd, Esquire
Kutak, Rock & Campbell
4400 Georgia Pacific Center
133 Peachtree Street, N.
Atlanta, Georgia 30303

Ben F. Johnson, III, Esquire
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

This 3rd day of April, 1991.

By: Paul R. Jordan
Paul R. Jordan

Supreme Court, U.S.
FILED
MAY 7 1991
OFFICE OF THE CLERK

(2)

No. 90-1548

IN THE SUPREME COURT OF THE UNITED STATES

Term: October 10, 1990

SILVIA KAISER a/k/a SILVIA KAISER BLOCK,
Individually, Petitioner

v.

BERNHARD MARTIN PEER, Individually, and
BEVERLY SUE SANDERS, Individually, and
BERINTEX COMPANY, LTD.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPERIOR COURT OF FULTON

COUNTY, GEORGIA

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

GEORGE O. LAWSON, JR.
Georgia Bar No. 440200
970 M.L. King, Jr. Drive
Suite 202
Atlanta, Georgia 30314
(404) 522-6964

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a citizen of a foreign country defending a civil lawsuit brought in a Georgia Court in the United States can invoke the privilege against self incrimination afforded by the Constitutions of the United States and of the State of Georgia based on her alleged fear of prosecution in a foreign country under a foreign statute.

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13, 14, 15,
18, 19, 22

State of Georgia Constituion
Article 1, Section 1,
Paragraph 16 .....1, 3, 6

CONSTITUTIONAL PROVISIONS INVOLVED

This case is predicated on the Fifth Amendment to the Constitution of the United States which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

State of Georgia Constitution, Article 1, Section 1, Paragraph 16

> No person shall be compelled to give testimony tending in any manner to be self-incriminating.

RESPONDENTS' STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct, however, Respondents supplement the statement of facts as set out below.

Petitioner seeks relief of this Court to prevent Respondents from questioning her as to ownership interests during Petitioner's management of certain Liechtenstein entities.

Respondents show that the case sub judice was instituted against Petitioner for converting investments which she obtained from Respondents in Liechtenstein to her own use in the United States of America. Respondents allege, among other things, that the Petitioner invested their funds in real properties, oil and gas wells and oil

and gas pipe lines and has informed the Respondents that their investments failed and their money was lost. The truth is Petitioner received and continues to receive monthly royalties from Respondents' investments.

Petitioner alleges that to answer certain discovery questions propounded to her will subject Petitioner to punishment under Liechtenstein secrecy laws which prevents a licensed trustee from revealing the names of persons holding an ownership interest in Liechtensteinian entities. Respondents assert that the laws of Liechtenstein do not prohibit the Petitioner from answering the discovery questions as propounded even in Liechtenstein; and the United States Constitution and Constitution of the State of Georgia do not provide any privilege which would

allow the Petitioner to be relieved of answering any questions.

Respondents show that the alleged pending prosecution against Petitioner in Liechtenstein has no connection whatsoever with the issue at hand. Further, the pending prosecution is not related to the issues of revealing the owners and beneficiaries of Holfina Trust or any other entity to which Petitioner is related in her capacity as a licensed trustee. Instead, the prosecution Petitioner alleges in Liechtenstein, if any, relates solely to a claim made by numerous investors who allege that they have been defrauded of their investment by the Petitioner and the information sought by Respondents would be available to those victims of Petitioner as well since the controlling statute in

Liechtenstein allows discovery of all secrets to a "legitimate private interest."

SUMMARY OF ARGUMENT

Petitioner was ordered by the Superior Court of Fulton County on Respondents' Motion to Compel to answer certain pertinent questions propounded to her at her deposition in the matter of Peer et al v. Kaiser et al. Petitioner refused to answer the questions propounded and asserted a Fifth Amendment privilege pursuant to the Constitution of the United States and the privilege against self-incrimination under the Constitution of the State of Georgia. The Supreme Court of Georgia denied Petitioner's application for an appeal and this writ of certiorari ensued.

Indeed, Petitioner is not afforded Fifth Amendment protection against self-incrimination in this civil proceeding in that the Fifth Amendment

privilege is a fundamental trial right and any prosecution that may result would be in Liechtenstein since the alleged law violated is Liechtenstein law.

In addition to there being no Fifth Amendment privilege against self incrimination afforded Petitioner, Respondent contends that the Petitioner is required to answer the questions propounded because there is a legitimate private interest in the Respondents which requires an answer under Liechtenstein law.

Petitioner's argument regarding the secrecy laws of the country of Liechtenstein "does not allow her to transact business under the laws of this country and state, yet cloak herself with the veil of secrecy under the laws of a foreign country."

ARGUMENT

The issue before the Court is not one of a constitutional nature wherein the establishment of a precedent is required. To the contrary, the issue before the Court is one of a discovery nature only that was correctly ruled on by the trial court and the Supreme Court of Georgia and the granting of a Writ of Certiorari is not required.

It is beyond question that a party may invoke his Fifth Amendment privilege to matters sought to be discovered in civil proceedings. United States v. Kordel, 397 U.S. 1 (90 SC 763, 25 LE2d 1)(1970); McCarthy v. Arndstein, 266 U.S. 34 (45 SC 16,k 69 LE 158)(1924). The issue before this Court is not whether a party may invoke her Fifth Amendment privilege to matters sought in a discovery

proceeding, but instead whether or not an alien is afforded protection in the United States of America for an alleged violation of foreign secrecy statutes in a foreign country pursuant to that country's law and not a violation of any Georgia statute or any U.S. statute where no prosecution will be conducted in the United States of America.

As stated above, Petitioner cannot be prosecuted in the United States for a violation of Liechtenstein secrecy laws and it is unquestioned that the Constitution of the United States is not applicable to the citizens of Liechtenstein in matters arising in and prosecuted in Liechtenstein. This Court has consistently held that neither the Constitution nor the laws passed pursuant to it have any force in a foreign territory except as applied

to its own citizens in such territory. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

Moreover, unlike the Fourth Amendment, the Fifth Amendment privilege against self incrimination is a fundamental trial right of criminal defendants. See Malloy v. Hogan, 378 U.S.1 (1964). A Fifth Amendment Constitutional violation occurs only at trial. See Kastigar v. United States, 406 U.S. 441, 453 (1972). It being obvious that no criminal trial will ever occur in the United States or one of its territories regarding the alleged Liechtenstein prosecution based on Liechtenstein law, affirmatively shows that the Petitioner has no Fifth Amendment privilege against self-incrimination available to her in the present discovery process.

Petitioner's position is contrary to this Court's decision in the Insular cases, which hold that not every constitutional provision is available even where the United States has sovereign power. See, e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922) (Fifth Amendment) right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914)(Sixth Amendment grand jury provision inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904)(jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (revenue clauses of Constitution inapplicable to Puerto Rico).

Equally important, the Petitioners reliance upon Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972) is misplaced. This Court correctly ruled in Zicarelli without addressing the Constitutional issue raised by Respondent in this appeal. Again, it should be noted by the Court that Petitioner incorrectly framed the issue presented in this case. The real issue is whether the Fifth Amendment privilege against self-incrimination is available to an alien protecting that alien from prosecution under foreign laws in a foreign country. The Petitioner presents, incorrectly, that the issue is whether or not an alien is entitled to the Fifth Amendment privilege against self-incrimination. The framing of the issue by Petitioner does not inform the

Court of sufficient facts for the Court to address the writ sought by Petitioner.

This Court squarely addressed the real issue presented here in Johnson v. Eisentrager, 339 U.S. 763 (1950), and rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.

The Johnson Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writ of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions.

Considering that this Court's analysis in Johnson, supra, is correct and that the Insular cases are correct,

the Petitioner's claim that the protection of the Fifth Amendment extends to aliens in foreign countries is totally without merit.

Respondent agrees that aliens receive certain constitutional protections when they have come within territories of the United States and developed substantial connections with this country. See, e.g., Kwong Hai Chew v. Coldwing, 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1986) (resident aliens entitled to Fifth and Sixth Amendment rights).

The Petitioner does not fall within the class of persons protected who are aliens who have come within the territory of the United States because

her Liechtenstein prosecution, if any, is not a prosecution that will occur in the United States. Again, Respondent would agree that Petitioner would be afforded the Fifth Amendment privilege against self-incrimination if she had even the remote fear of being prosecuted in the United States.

Further, Petitioner has no Fifth Amendment privilege against self-incrimination relating to the secrecy laws of the country of Liechtenstein. In Zicarelli the questions could have been answered without admitting to a crime. In the case sub judice, if Petitioner answers the question propounded and there was no legitimate private interest in the Respondents, she might be found to be violating the secrecy laws of Liechtenstein. However, the trial court was correct in

its ruling on the Motion to Compel wherein the Court held "...that Defendant should not be allowed to transact business under the laws of this country and state, yet cloak herself with the veil of secrecy under the laws of a foreign country."

In the 11th Circuit Court of Appeal in In Re Grand Jury Proceedings (the Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106, 105 S. Ct. 778, 83 L.Ed. 2d 774 (1985), the Court held that U.S. Courts could find civil contempt and impose sanctions to compel a person to violate foreign bank secrecy laws by producing documents that are located on foreign soil. In that case, the court concluded that the inevitability of conflict between laws of different countries did not excuse one from

compliance with United States law who chooses to operate in the United States and such other countries.

Also in United States v. Payner, 447 U.S. 727, 732 N.4, 100 S.Ct. 2439, 2444 N.4, G5 L.Ed. 2d 468 (1980), this Court has held that "foreign bank secrecy laws provide no privacy rights for U.S. Citizens that are not otherwise present under the constitution and laws of the United States."

Petitioner's case fits within these cases in this way: While a foreign citizen with liabilities under foreign law, she chose to operate in the United States to commit fraud against the Respondents. By being a foreign citizen she does not obtain greater protection than a U.S. Citizen would have under the same facts and circumstances. A U.S. Citizen would

not be able to rely on the possibility of prosecution by some unknown third party in a foreign country as a shield to protect him from answering questions by raising the 5th Amendment privilege. Payner, supra. Petitioner, likewise, should not have greater privileges than a U.S. Citizen.

The Petitioner seeks the protection of the Fifth Amendment to avoid possible future prosecution in the Country of Liechtenstein, if an owner of one of the entities she manages or controls seeks to prosecute her under the law requiring such information to be kept confidential. (J.A. 16 - 19)

The question of ownership of Holfina Trust does not go to the issue of fraud and theft, but instead goes to who benefits from such fraud and theft, if it exists.

Petitioner did not assert the 5th Amendment on the ground that to answer the question would give evidence that could be used to convict her of fraud and theft, but supposedly to protect her from committing what she says is a new and different crime under Liechtenstein law - revealing a third party ownership interest in a Liechtenstein entity. The crime for which Petitioner fears prosecution has not yet occurred. Therefore, Petitioner's grounds for refusing to answer pertinent questions is based on mere speculation.

The same law provides that "the perpetrator shall not be punished where the disclosure...is justified...by a...duly authorized private interest." (J.A. 18)

And that "The perpetrator shall only be prosecuted upon the demand of the person whose interest in secrecy was impaired". (J.A. 18 - 19)

The trial court held a hearing on Respondent's Motion to Compel, received Petitioner's evidence in opposition to the motion and was asked to rule on whether or not Respondents were a legitimate private interest and whether or not there was a real danger of prosecution of Petitioner, if she were required to answer. The trial court ruled against Petitioner on both issues. (J.A. 1 - 5)

In cases involving the extra territorial application of the Constitution, this Court has taken care to state whether the person claiming

constitutional protection is a citizen, see, e.g. Reid v. Covert, 354 U.S. 1 (1957), or an alien, see, e.g., Johnson, supra. The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any judicial relationship between our country and the undefined, limitless class of non-citizens who are beyond our territory.

Petitioner falls within the class of non-citizens, i.e. alien, who is not afforded constitutional protections for prosecution in a foreign country of a foreign statute.

CONCLUSION

The issue as to whether or not Petitioner is afforded Fifth Amendment protection against self-incrimination for prosecution in Liechtenstein for an alleged violation of secrecy laws is not one of first impression and this Court has consistently rejected the claim that aliens such as Petitioner are entitled to Fifth Amendment privileges outside the sovereign territory of the United States. Therefore, Petitioner not being a United States citizen, the United States Constitution not having any force or effect in Liechtenstein, and considering that no trial will ever be held in the United States or its territories regarding this matter, the Petitioner is not afforded any protections pursuant to the Fifth

Amendment of the United States Constitution or any similar provision of the Constitution of the State of Georgia.

Accordingly, the Petitioner's prayer for a writ of certiorari to review the decision of the Superior Court of Fulton County, and cert. denied by the Supreme Court of Georgia, in this case should be denied by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George O. Lawson, Jr., certify that I have served three copies of the foregoing Brief in Opposition by placing same in the United States mail with sufficient postage attached thereto to insure delivery to the following attorneys:

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This the 8th day of May, 1991.

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